STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION,	)	
Charging Party,	)	Case No. S-CE-551-S
v.	)	PERB Decision No. 1104-S
STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS),	)	May 18, 1995
Respondent.	)	

Appearances: Suzanne L. Branine, Staff Legal Counsel, for California Correctional Peace Officers Association; State of California (Department of Personnel Administration) by Paul M. Starkey, Labor Relations Counsel, for State of California (Department of Corrections).

Before Carlyle, Garcia and Johnson, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment. Relations Board (PERB or Board) on exceptions filed by the State of California (Department of Corrections) (CDC) to a PERB administrative law judge's (ALJ) proposed decision (attached hereto). The ALJ found that CDC denied the California Correctional Peace Officers Association (CCPOA) its rights under section 3519.5(b) of the Ralph C. Dills Act (Dills Act).[1]

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519.5 states, in pertinent part:

> It shall be unlawful for an employee organization to:
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

The Board has reviewed the entire record in this case, including the proposed decision, transcript, exhibits, CDC's exceptions and CCPOA's response thereto.[2] The Board finds the ALJ's findings of fact to be free of prejudicial error. The Board affirms the ALJ's conclusions of law and that the District violated Dills Act section 3519.5(b) but revises the proposed remedy in accordance with the discussion below.

DISCUSSION

In its exceptions, CDC contends that PERB should defer its jurisdiction over the unfair practice charge to the State Personnel Board (SPB).

CDC asserts that the alleged conduct, previously before the SPB, concerned CCPOA's right to effectively represent union members without CDC's interference. The SPB has jurisdiction over disciplinary actions taken against civil service employees. (Trustees of the California State University (1990) PERB Decision No. 805b-H (CSU).) Disciplinary action based on the merits of the case and an employer's interference with a union's representational rights are two separate and distinct issues handled by two separate and distinct agencies. PERB has exclusive jurisdiction to consider unfair labor practices.

> discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

[2]On request of both parties, oral argument was granted on November 2, 1994, and heard by the Board on January 26, 1995.

Interference by an employer to a union's representational right is an unfair labor practice. Section 3541.5 of the Educational Employment Relations Act (EERA)[3] states, in pertinent part:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. (Emphasis added.)

The California Supreme Court in San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893] found that PERB has the exclusive initial jurisdiction to determine whether the charges of unfair practices are justified, and if so, to determine the appropriate remedy. Therefore, CDC's contention that this unfair labor practice matter should be deferred to the SPB is not in conformance with the California Supreme Court's mandate. Accordingly, CDC's jurisdictional exception is rejected.

CDC's assertion of collateral estoppel is also without merit. Collateral estoppel precludes the relitigation of an issue already decided in another proceeding where: (1) the issue decided in the prior proceeding is identical to that sought to be relitigated; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity in the prior proceeding. (CSU.)

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[3]EERA is codified at Government Code section 3540 et seq. It is noted that EERA section 3541.5 and Dills Act section 3514.5 have the same language.

The Board in the CSU case, cited People v. Sims (1982) 32 Cal.3d 468, 484 [186 Cal.Rptr. 77] stating that collateral estoppel is applicable to decisions of administrative agencies when: (1) the agency is acting in a judicial capacity; (2) it resolves disputed issues of fact properly before it; and (3) the parties have had an adequate opportunity to litigate the disputed issues. Collateral estoppel in this case is inappropriate because the issues litigated before the SPB, discipline of state civil service employees, are not identical to the issues litigated before PERB, that is, whether CDC interfered in CCPOA's right to represent its members. We, therefore, dismiss CDC's collateral estoppel exception.

CDC also asserts that the remedy as issued in this case is inappropriate claiming that it is prospective and overly broad. We agree. Given the particular facts in this case, the remedy of the ALJ is overly broad and we modify it to eliminate the prerequisite that witnesses be informed that interviews are voluntary and free of reprisal. PERB is authorized to remedy violations of the Dills Act. Section 3514.5 states:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board.

Furthermore, section 3514.5(c) bestows upon PERB the power to:

> . . . issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without

> back pay, as will effectuate the policies of this chapter.

In order to further the purposes of the Dills Act, PERB's remedial power must be exercised. (Dills Act section 3514.5(c); Oakland Unified School Dist, v. Public Employment Relations Bd. (1981) 120 Cal.App.3d 1007, 1014 [175 Cal.Rptr. 105].) To effectuate the purposes of the Dills Act given the particular facts in this case, it is appropriate to order CDC to cease and desist from interfering with CCPOA's right to represent employees without requiring CDC to first verbally inform potential CCPOA witnesses that any interview is voluntary and will be free of reprisal. The Board believes that a cease and desist notice is sufficient.

ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the State of California (Department of Corrections) (CDC) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(b). CDC violated the Dills Act by interfering with the California Correctional Peace Officers Association's (CCPOA) right to represent employees.

Pursuant to section 3514.5 of the Dills Act, it is hereby ORDERED that CDC, shall:

A. CEASE AND DESIST FROM:

1. Interfering with CCPOA's right to represent employees.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of CDC indicating that CDC will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive work days. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered with any other material.

2. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Members Garcia and Johnson joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An agency of the State of California

After a hearing in Unfair Practice Case No. S-CE-551-S, California Correctional Peace Officers Association v. State of California (Department of Corrections). in which all parties had the right to participate, it has been found that the State of California (Department of Corrections) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(b).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Interfering with the California Correctional Peace Officers Association's right to represent employees.

Dated: _____

STATE OF CALIFORNIA
(DEPARTMENT OF CORRECTIONS)

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS), Respondent.	)	Unfair Practice Case No. S-CE-551-S PROPOSED DECISION **(3/29/94)**

Appearances: Shawn P. Cloughesy, Supervising Legal Counsel, for California Correctional Peace Officers Association; State of California (Department of Personnel Administration) by Paul M. Starkey, Labor Relations Counsel, for State of California (Department of Corrections).

Before Gary M. Gallery, Administrative Law Judge.

PROCEDURAL HISTORY

The California Correctional Peace Officers Association (CCPOA) filed an unfair practice charge on December 13, 1991. After investigation, and on January 29, 1992, the general counsel of the Public Employment Relations Board (Board or PERB) issued a complaint against the State of California (Department of Corrections) (Department or CDC). The complaint charged the Department with denial of CCPOA's rights under section 3519(b) of the Ralph C. Dills Act (Dills Act).[1] The violation was

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references in this decision are to the Government Code. In relevant part section 3519 provides that it shall be unlawful for the state to:

> (b) Deny to employee organizations rights guaranteed to them by this chapter.

predicated upon the allegation that on or about December 10, 1991, Employee Relations Officer Cathleen Catti (Catti) told Rubin Garcia (Garcia) that, should he testify at a State Personnel Board (SPB) hearing that it was the usual practice for yard officers to leave the yard without notifying supervisors, an investigation which could result in adverse actions against employees might result.

The Department filed its answer on February 25, 1992, denying violations of the Dills Act and raising defenses that will be addressed in other parts of this decision.

A PERB conducted settlement conference was without success. After several continuances, this matter was heard on August 10, 1993, at Sacramento, California. Further continuances on behalf of the Department were granted, and on November 15, 1993, respondent waived presentation of its final witness. Upon submission of briefs on December 23, 1993, the matter was deemed submitted.

FINDINGS OF FACT

Charging party is a recognized employee organization within the meaning of section 3513(b). The Department is the state employer within the meaning of section 3513 (j) .

This controversy arose at the Northern California Women's Facility at Stockton, California.

In the spring of 1991, William Constante (Constante), a correctional officer at the facility, was served with a statement of adverse action with a suspension of 30 days for, among other

things, having "abandoned" his post as yard/work crew officer when he went to the landscape shop in pursuit of an inmate,[2] and that he failed to notify his supervisor that he was leaving his area of responsibility.[3]

Correctional Officer Douglas Peterson (Peterson), then CCPOA chapter president, represented Constante at a "Skelly" hearing on the adverse action, held on July 11, 1991, before the chief deputy warden. Peterson asserted, among other defenses, that it was common place for yard officers to leave the yard area without notifying their supervisor.

Peterson said there were two officers assigned to the yard. One did not have flexibility, but the other did. He spoke from personal experience having served as yard officer previously.[4] He also mentioned that other officers would confirm that practice, and named Correctional Officer Garcia.[5]

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[2]The yard officer is one of two who are observing inmates in the yard.

[3]The supervisor is the watch sergeant who reports to the watch commander. The yard/work crew officer is responsible for maintaining order on the yard, the supervision of inmate yard crew workers and direct supervision of the recreation facilities and equipment on the yard or in the gymnasium.

[4]According to Peterson, he was assigned to the position when he was president of the chapter. The Department knew of his union position and that he was "running about." The second officer does not have an inmate crew and serves as a "gopher" for the other officer or the supervisor, according to Peterson.

[5]Garcia proceeded Peterson as a yard officer. Garcia said he served the post in 1988-89.

Suzanne Branine, staff legal counsel at CCPOA, represented Constante before SPB in his appeal of the suspension.

In investigating the case, Branine conferred by telephone with Peterson on November 8 or 9. They discussed the defense that it was common practice for yard officers to leave the yard area without first notifying the supervisor. Branine asked Peterson if there were any officers who were familiar with the practice. Peterson indicated Garcia, who worked in the same work area with Peterson, was one such person.[6] Branine then discussed with Garcia the practice. Garcia confirmed that it was the practice to leave without notifying the supervisor. Garcia agreed to testify to that effect at the SPB hearing.

Branine's defense to the abandonment of post charge against Constante was to be predicated upon the so called "just cause" provision. Among the Department's polices as expressed in its operations manual is the following:

> Adverse personnel actions taken against employees cannot be sustained where it is found that management acted in an arbitrary, capricious or discriminatory manner. The following guidelines may be used to determine if there is "just cause" for the action.
>
> . . . . . .
>
> - The rules, standards, and instructions shall be enforced uniformly without discrimination. If enforcement has been lax, management shall not suddenly change direction and crack down without first warning employees of its intent.

[6]Garcia is a board member of the local CCPOA chapter.

In preparation of the SPB hearing to be held on December 13, 1991, Branine spoke with Catti on December 9 by telephone. Catti was the employee relations officer for CDC and was representing the Department at the SPB hearing. To insure easy presentation of witnesses at the hearing, Branine gave Catti a verbal list of witnesses she expected to have at the hearing. Garcia was among the names Branine referred to.

Catti inquired as to the import of Garcia's expected testimony. Branine initially resisted revealing the substance of his anticipated testimony. Catti said she would not release Garcia (meaning from his post) to attend the hearing which was to be held at the facility. Branine indicated that he was going to testify that yard officers left the yard without notifying their supervisor. According to Branine, Catti responded, "I hope he's not going to testify that officers leave the yard without notifying their supervisors first." It was a form of question, said Branine. Catti referred to the post orders about reporting to the supervisor.[7]

On December 10, Garcia was ordered by his supervisor, Lieutenant Robert Martinez (Martinez), to go to Catti's office. Garcia was told it was about the Constante hearing. He asked if he could have representation. Martinez told him no. Garcia did not want to go, but Martinez ordered him to go to Catti's office.

[7]Peterson testified that he told Catti, sometime before the SPB hearing, that Garcia could corroborate his contention that officers left the yard without telling the supervisor.

At that meeting, Catti asked Garcia what he was going to say at the Constante hearing.[8] Garcia replied that he was going to say that it was the practice of officers to leave the yard without notifying the supervisor.

Catti showed Garcia the facility's "Post Orders" for the yard/work crew officer. Within that post order it is provided:

> No uniformed officer will leave his/her post without the authorization from a supervisor or have been properly relieved. . . .

Catti told Garcia that if he testified as he said he would there could be more adverse actions against other officers. He was, he said, very intimidated by her remarks.

Soon thereafter, Garcia told Peterson of his conversation with Catti. Peterson called Branine and related the experience. Branine spoke with Garcia on December 11, who explained that Branine was mistaken about what he would be willing to testify about. The post orders required supervisors to be notified before yard officers leave the yard. He did not want to get others in trouble and that he was sorry for the misunderstanding they had.

Garcia told Branine that he would testify that it was not the practice to leave the yard without notifying the supervisor. Branine discussed with Garcia possible exceptions. He agreed to testify that the officer might leave without telling the supervisor in emergencies or where the guard suspected an inmate was carrying contraband or drugs. She told him she would not ask

[8]Garcia did not ask Catti for representation.

him if it was common practice to leave the yard without notifying the supervisor.

Branine felt, however, the common practice defense was much stronger than the defense of leaving in an emergency.

According to Branine, several potential witnesses refused to speak with her. Catti had told her some officers did not want to speak with her. Branine did not try to get any other officer to testify to the common practice defense. She felt that other officers would be threatened as well. However, she further testified that other than Peterson and Garcia, she did not discuss the common practice defense with other officers.

Peterson testified that he tried to get other officers to testify, but they refused.

No findings are made with respect to refusal by other officers to come forward to testify because of the uncorroborated hearsay statements of Peterson and Branine.

Branine consulted with Constante. After discussion, it was deemed strategic to his defense at the SPB hearing to assert that a yard officer could leave the yard, without notifying the supervisor, if there was an emergency or the yard officer suspected an inmate was harboring drugs. Peterson offered to testify to the common practice issue but Branine elected not to call him because of anticipated retaliation, and because he was

chapter president, she was afraid the Department would portray him as biased.[9]

The first day of the Constante hearing was December 13. On this same day, Branine filed the instant unfair practice charge. At no time did Branine call to the attention of the SPB administrative law judge (ALJ) presiding over the hearing the Catti-Garcia incident.

Garcia did not testify until the second day of the Constante hearing, which took place on January 24, 1992.[10] Branine was not surprised by his testimony. He testified that officers did not leave the post without notifying the supervisor. He testified in this manner because he did not want to get officers in trouble. At the formal hearing before PERB, he testified that yard officers do leave the yard without telling the supervisor.

The SPB ALJ found that

> The post orders for Yard/Work Crew officer are in writing. They require the officer to notify his supervisor if they leave the yard. On occasion officers do not inform the supervisor when they leave the yard. This would occur when an alarm goes off and if an inmate is suspected of carrying contraband or drugs. . . .

The SPB ALJ disbelieved Constante's assertion that he left the yard to pursue an inmate he suspected of carrying contraband or drugs, because of Constante's behavior. After first apprehending the inmate and hearing her explanation as to why she

[9]Peterson testified that this had happened to him in another proceeding.

[10]Garcia was under subpoena by CCPOA.

was late, Constante left the inmate in the yard and went to the place the inmate stated she had been delayed.[11]

Employee relations officers such as Catti are not authorized to undertake employee misconduct investigations. Such investigations are performed by a lieutenant and only after authorization by the warden. In this case there is no evidence that such an investigation was undertaken nor authorized by the warden prior to Catti's interview with Garcia.

The parties had a memorandum of understanding in effect from May 26, 1989 to June 30, 1991. A new memorandum was consummated between the parties covering the period September 19, 1992 to June 30, 1995. Thus, during the fall of 1991, and spring of 1992, the parties had no operative memorandum of understanding.

Included within the 1992-95 memorandum of understanding is section 9.15.[12] It provides:

> a. No State official or employee shall impose or threaten to impose reprisals on Unit 6 employees, discriminate or threaten to discriminate against Unit 6 employees, or otherwise interfere or threaten to interfere with Unit 6 employees, restrain or threaten to restrain Unit 6 employees, or coerce or threaten to coerce Unit 6 employees because of their exercise of their appeal rights to the SPB or its authorized representative or for appearing as a witness before the SPB or its authorized representative.

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[11]The union has a year from the date of the decision to file a petition for Writ of Mandate in Superior Court.

[12]A review of the prior memorandum of understanding indicates that this section is new.

ISSUE

The issue in this case is whether Catti's comments to Garcia about his testimony constitutes a violation of the Dills Act?

CONCLUSIONS OF LAW

Section 3519(b) provides that it is unlawful for the state to deny employee organizations rights guaranteed to them by the Dills Act. The employee organization is entitled to represent its members in their employment relations with the state. Here, CCPOA was representing bargaining unit member Constante in a disciplinary proceeding before SPB regarding his appeal of a suspension. Clearly, this activity related to employment relations with the employer, and CCPOA had a right to undertake this representation without interference from the Department.[13]

CDC first urges PERB to exercise a rule of accommodation, deferring to SPB to insure the integrity of SPB's own hearing processes, particularly with regard to protection of witness testimony.

In addition, CDC moves to dismiss the complaint on the ground that "the matter is within the exclusive and/or primary jurisdiction of the State Personnel Board, or, in the alternative, is barred by collateral estoppel."

PERB has previously addressed the overlap of SPB and its own jurisdictional responsibilities. In State of California

[13]The employee organizations' rights includes a broad spectrum of concerns which arise out of the employment relationship and employee rights arising out of the Dills Act. (See Sierra Joint Community College District (1983) PERB Decision No. 345.)

(Department of Transportation) (1984) PERB Decision No. 459-S PERB cited from Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168 [172 Cal.Rptr. 487] the following:

> . . . PERB and the State Personnel Board are not in competition with each other; rather, each agency was established to serve a different, but not inconsistent, public purpose. The State Personnel Board was granted jurisdiction to review disciplinary-actions of civil service employees in order to protect civil service employees from politically partisan mistreatment or other arbitrary action inconsistent with the merit principle . . . .
>
> PERB, on the other hand, has been given a somewhat more specialized and more focused task: to protect both employees and the state employer from violations of the organizational and collective bargaining rights guaranteed by SEERA. Although disciplinary actions taken in violation of SEERA would transgress the merit principle as well, the Legislature evidently thought it important to assign the task of investigating potential violations of SEERA to an agency which possesses and can further develop specialized expertise n the labor relations filed. [Citations and footnote omitted.] Thus, insofar as possible, we should construe the relevant provisions to permit an accommodation of the respective tasks of both the State Personnel Board and PERB.

CDC concedes that this is not a pure collateral estoppel case. As CCPOA points out, the SPB hearing tested the propriety of the discipline imposed on Officer Constante. Constante's suspension has no bearing on the case before PERB.

The doctrine of collateral estoppel is applied to preclude the relitigation of an issue already decided in another proceeding where: (1) the issue decided in the prior proceeding is identical to that sought to be relitigated; (2) the previous

proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party in the prior proceeding. (See Trustees of the California State University (1990) PERB Decision No. 805.b-H.) Collateral estoppel effect may be given to decisions of administrative agencies when: (1) the agency is acting in a judicial capacity; (2) it resolves disputed issues of fact properly before it; and (3) the parties have had an adequate opportunity to litigate such disputed issues. (Trustees of the California State University, supra, citing The People v. June Leora Lopes Sims (1982) 32 Cal.3d 468, 484 [186 Cal.Rptr. 77].)

The doctrine does not apply to the issues before PERB. As noted, the SPB hearing tested the rightfulness of the suspension of Constante for job related misdeeds. These issues were properly before SPB. However, SPB did not have the issue of interference with CCPOA's Dills Act rights before it, nor did it rule on such issue. The matter of CCPOA's rights under the Dills Act was not litigated before the SPB. CCPOA's rights to be free from interference by CDC is a distinct and separate right from Constante's or Garcia's rights to freely participate in CDC's efforts to defend Constante from the Department's disciplinary efforts. (See State of California (Franchise Tax Board) (1992) PERB Decision No. 954-S; State of California (Department of Parks and Recreation) (1993) PERB Decision No. 1026-S.)

Under no circumstances will any ruling from PERB alter or impact the SPB ruling on CDC's discipline of Constante. Contrary

to CDC's assertions, there is no way that PERB's exercise of jurisdiction in this case provides for "potential for inconsistent results" which "undercuts the authority of both agencies" or presents "a conflict of constitutional dimension."

For this reason, both arguments advanced by CDC, lack of jurisdiction and collateral estoppel, are rejected.

CDC also argues that charging party should be limited to the forum of first resort, in this case SPB. Citing State of California (Department of Developmental Services) (1982) PERB Decision No. 228-S, CDC argues that PERB's determination that the moving party's failure to testify regarding certain matters before the SPB made his testimony before PERB "suspect." PERB's observations in that case were directed to issues of credibility not for any proposition that use of SPB proceedings precludes also filing an unfair practice charge with PERB. CDC offers no other support for its assertion that charging party is limited to one forum. The argument is rejected.

The Department moves to dismiss the complaint on the grounds that the remedy is prospective and involves conduct now covered in the current memorandum of understanding between the parties and PERB should thus defer the matter to arbitration. Section 9.15 of the new memorandum of understanding addresses the right of employees to pursue SPB processes, including as a witness without retaliation from CDC.

In State of California (Department of Youth Authority) (1992) PERB Decision No. 962-S, PERB adopted the rule of Litton

Financial Printing Div. v. NLRB (1991) _____U.S.____, 115 L.Ed.2d. 177 [137 LRRM 2441], holding that:

> arbitration clauses do not continue in effect after expiration of a collective bargaining agreement except for disputes that: (1) involve facts and occurrences that arose before expiration; (2) involve post-expiration conduct that infringes on rights accrued or vested under the agreement; or (3) under normal principles of contract interpretation, survive expiration of the agreement.

The incident giving rise to this unfair practice charge took place during the fall of 1991. At that time the parties had no operative memorandum of understanding. Indeed, the protection afforded individuals by section 9.15 was created after the incident giving rise to this unfair practice charge. Moreover, the protection goes to employees of the bargaining unit. Nothing is stated in section 9.15 about charging party's rights. The agreement does not cover events occurring prior to the commencement of the agreement, nor does it address CCPOA's rights. The dispute cannot be deferred to arbitration. (See also State of California (Department of Parks and Recreation), supra, PERB Decision No. 1026-S.)

In cases of alleged interference, a violation will be found where the employer's acts interfere with the exercise of protected rights and the employer is unable to justify its actions by proving operational necessity. (Ibid.)

CCPOA relies on National Labor Relations Board (NLRB) precedent in prescribing its right to have its witnesses free from employer questioning concerning preparation for unfair labor

practice proceedings. It premises CDC's wrongdoing on the impact Catti's discussion had on Garcia, and other officers, who according to CCPOA, refused to testify at the Constante hearing on the common practice of leaving a guard post without first advising the supervisor.

CDC attempts, in its post-hearing brief, to mitigate the impact of Catti's discussion with Garcia, on substantive grounds, and an attack on Garcia's credibility.

I reject these efforts.[14] It is clear that, as a result of the meeting with Catti, Garcia did change his proffered testimony that there was a common practice of leaving the yard without notifying the supervisor to a more limited practice at the SPB hearing. Clearly, the effect of Catti's interview with Garcia was to cause him to change his testimony at the SPB hearing, thus undercutting CCPOA's just cause defense.

With regard to the impact of Catti's statement on other potential witnesses, CCPOA has failed to establish substantive evidence of CDC's causing others to refuse to come forward about the past practice of yard officers leaving their post without first notifying the supervisor. The only evidence on this point was the hearsay statements of Peterson and Branine.

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[14]Garcia's credibility was enhanced by his admission of reversing himself as a result of the Catti interview. Cross-examination of Garcia did not reveal any essential inconsistencies in his rendition of what transpired during the interview with Catti. Finally, there was no conflicting evidence presented by the Department about what transpired during the interview.

Under NLRB precedent, an employer may engage in questioning employees where there is a legitimate cause to inquire on matters involving their section 7 rights without incurring Section 8(a)(l) liability.[15] Legitimate purposes are either verification of a union's claimed majority status to determine whether recognition should be extended or the investigation of facts concerning issues raised in a complaint where such interrogation is necessary in preparing the employer's defense for trial of the case.

In Johnnie's Poultry Company (1964) 146 NLRB 770 [55 LRRM 1403] (Johnnie's Poultry), the NLRB outlined limitations on employer questioning employees. The NLRB stated:

> Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself

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[15]Section 7 refers to the provisions of the National Labor Relations Act (NLRA) which commences at 29 United States Code section 141. Section 7 provides in pertinent part:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

Section 8(a)(1) makes it an unfair labor practice for the employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

> coercive in nature; and the questions must not exceed the necessities of the legitimate purpose of prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege. (Fns. omitted.)

In a U.S. Court of Appeal review of an NLRB decision suggesting that violation of the Johnnie's Poultry rule was a per se violation of the NLRA it was stated:

> . . . legality of pre-arbitration interviews is generally a contractual matter to be determined by the parties in establishing a grievance-arbitration procedure, subject only to the normal restraints imposed by the Act that the employer conduct not be unlawfully coercive in a particular case.

The court also held:

> An employer also may be prohibited from prying into union activities, or using the interview as an excuse to discover the union strategies for arbitration.
>
> (Cook Paint and Varnish Company (D.C. Cir. 1981) 648 F.2d 712 [106 LRRM 3016] (Cook Paint and Varnish).)

Charging party asserts that Catti's interrogation went to the heart of Constante's defense of common practice.[16]

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[16]Charging party also contends that pre-disciplinary hearing interviews are governed by section 19574.1 of the Government Code and that section creates a barrier to CDC's interview of Garcia. In relevant part the section provides:

> (a) . . . The employee, or the designated representative, shall also have the right to interview other employees having knowledge of

Here, Catti already knew the purpose for which CCPOA called Garcia to testify at the SPB hearing. Branine had told her during the prehearing telephone call on December 9.[17] Catti's response to Garcia's confirmation was to show him the POST order and to advise him that should he testify to that effect, officers would get in trouble.

Catti's inquiry did not go into an investigation of employee wrongdoing, or dereliction of yard officer duties. She asked no questions of when such leaving of the yard duty occurred, nor by whom. Her only interest was to confirm the nature of his testimony at the SPB hearing and to impress on Garcia the impact of his testimony. It was successful in both objectives. She confirmed, as a result of her question, the strategy that CCPOA intended to present at the SPB hearing. She was successful in intimidating Garcia to changing his testimony so that CCPOA could not defend the Constante suspension on the just cause argument.

> the acts or omissions upon which the adverse action was based. Interviews of other employees and inspection of documents shall be at times and places reasonable for the employee and for the appointing power.

Because the section refers only to employees as having the right to interview witnesses, the Department does not have an option to interview witness prior to the hearing.

I do not read the section as precluding interviews by a department prior to a hearing on appeals of discipline issued by the department. Rather, the section insures the right of the disciplined employee to interview witnesses. Nor do I rely on these sections for finding CDC in violation of the Dills Act.

[17]Also unrebutted is Peterson's testimony that he told Catti that Garcia could corroborate the practice of yard officers leaving their post without supervisor's approval.

Catti's action was taken without any deference to the mandates of employer interview imposed by Johnnie's Poultry and Cook Paint and Varnish. Garcia was accorded neither an assurance that his participation in the interview was voluntary, and that there would be no reprisals flowing from his participation. Indeed, his supervisor gave him an order to attend the hearing.

The Department contends the union has failed to prove a violation of the Dills Act based upon a reading of among other cases, Novato Unified School District (1982) PERB Decision No. 210, arguing that intent to discriminate is a necessary element of its case in chief, and that CCPOA has failed to prove intent in this case.

The argument and the reliance on Novato are rejected. This is not a discrimination case as was Novato. Rather, this is a case of interference, governed by Carlsbad Unified School District (1979) PERB Decision No. 89, and reiterated in State of California (Department of Parks and Recreation), supra, PERB Decision No. 1026-S, set forth above. Carlsbad also held that proof of unlawful intent is not required in establishing the necessary elements of interference.

The Department claims that the state's interest in defense preparation in disciplinary cases and to investigate employee misconduct outweighs CCPOA's claim of interference.

The first argument has been addressed in the discussion of NLRB precedent. Those cases recognize the employer's efforts to prepare for defense of discipline cases. There is however

limitation on such undertaking as prescribed in Cook Paint and Varnish.

As to the second argument, the facts of the case do not back CDC's contention that the employer was undertaking an investigation. As noted, Catti already knew of CCPOA's assertion that yard officers were leaving their area without notifying the supervisor. Peterson raised the contention in the "Skelly" hearing, he told her directly of the practice and Branine told her on December 9. Rather than pursue this alleged breach of post orders through the normal channel for investigation, Catti called in CCPOA's witness and asked him if that is what he was going to testify to. Her inquiry was not an investigation. Investigations were undertaken only after authorization by the warden, and carried out by an officer at the lieutenant level.

CDC further moves to strike charging party's post-hearing brief to the extent and on the grounds that it raises a new allegation that Garcia was denied union representation in his meeting with Catti.

Charging party asks that the allegation be included only to demonstrate the intimidating atmosphere encountered by Garcia when meeting Catti on December 10.

Accordingly, no determination will be made regarding the denial of Garcia's request for representation by Lieutenant Martinez.

CONCLUSION

The Department violated the Dills Act by its interference with CCPOA's rights when Catti interrogated Garcia without assurances of the voluntary nature of his participation in the interview and his freedom from retaliation. The Department offered no operational necessity for undertaking such an interview without notice to the employee.

REMEDY

Section 3514.5(c) empowers PERB to order an offending party to cease and desist from an unfair practice and to take affirmative action to effectuate the policies of the Dills Act. It is therefore appropriate to direct the Department to cease and desist from denying CCPOA its rights to represent employees without interference by CDC. This includes the right to have witnesses called by CCPOA without unrestricted interrogation by CDC representatives. Witnesses to be questioned by a CDC representative shall be given notice that the interview is voluntary and free from reprisal.

It is also appropriate that the Department be required to post a notice incorporating the terms of the Order. The Notice should be subscribed by an authorized agent of the Department, indicating that it will comply with the terms thereof. The Notice shall not be reduced in size. Posting such notice will provide employees with notice that CDC has acted in an unlawful manner and is being required to cease and desist from this activity and will comply with the order. It effectuates the

purposes of the Dills Act that employees be informed of the resolution of the controversy and will announce CDC's readiness to comply with the ordered remedy. (Davis Unified School District, et al. (1980) PERB Decision No. 116; Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the State of California (Department of Corrections) (CDC) has been found to have violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(b). Pursuant to section 3514.5, it is hereby ordered that CDC and its representative shall:

A. CEASE AND DESIST FROM:

1. Interfering with California Correctional Peace Officers Association's (CCPOA) right to represent employees by interviewing CCPOA witnesses without first advising them such interview is voluntary and free from reprisal.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Inform potential CCPOA witnesses that any interview is voluntary on the part of the witness and shall be free from any reprisal.

2. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to state employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the state indicating that CDC will comply

with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order with the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or

filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Gary M. Gallery
Administrative Law Judge